

## COMPARING RACE AND SEX DISCRIMINATION IN CUSTODY CASES

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There is no shortage of legal scholarship on the relationship between race and sex discrimination. Most of this scholarship over the past decade, however, has focused on the “intersection” between the two, along with related issues of multidimensionality, multiple consciousness, and anti-essentialism.<sup>1</sup> This Lecture focuses on race and sex, not where they cross, but what they look like side by side. The legal world has become accustomed to talking in the same breath about race

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1. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72 (explaining that to combat racism or sexism requires the formulation of legal theory and public policy that recognizes the interdependence of racism and sexism); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (arguing that the treatment of “race and gender as mutually exclusive categories of experience and analysis [distorts] the multidimensionality of Black women’s experience”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (attacking “gender essentialism—the notion that a unitary, ‘essential’ women’s experience can be . . . described independently of race”); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 8-9 (1995) (discussing the treatment of African American women within the criminal justice system); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 45, 72 (1988) (explaining that the recognition of African Americans as a “separate and distinct” group requires acknowledgment that “two innate and inerasable traits, being both black and female, [contribute to their] special status in American society”); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8 (1989) (positing that African American women bifurcate their experiences and histories as women and as African Americans in performing legal analysis); Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 846-47 (1997) (advocating for the inclusion of women of color in the discussion over affirmative action).

and sex, or about women and minorities—in non-discrimination legislation, in legal scholarship, and in common parlance—as if discrimination based on these factors operated the same way. Yet, there has been little systematic effort to compare the similarities of race and sex discrimination, at least not recently. Justice Brennan, back in 1973, in a failing effort by four Justices of the United States Supreme Court to obtain suspect classification status for sex, made the case for treating sex like race by stating that sex, like race, is an “immutable characteristic determined solely by the accident of birth,” which “frequently bears no relation to ability to perform or contribute to society.”<sup>2</sup> Little has been done in the last quarter-century to extend our thinking about the similarities between race and sex beyond these words, except perhaps (and oddly enough) to conclude that categories based on race, and even sex, are *not* immutable after all.<sup>3</sup>

Neither has much nuanced thinking been done on the *differences* between race and sex discrimination. One of the conclusions of the vast intersectionality literature is that the addition of race discrimination to sex discrimination does not merely make it worse, but changes the nature of the discrimination.<sup>4</sup> This claim asserts qualitative, not just quantitative, differences between race and sex discrimination. Yet, these differences have not yet been spelled out in any systematic detail. Some scholars have offered examples to show how black women may experience a wrong differently from white women,<sup>5</sup> or black men,<sup>6</sup> but these

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2. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

3. See, e.g., Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1446 (1999) (arguing that race is not an immutable, biological trait, and the United States Supreme Court has not treated it as such, but rather as a social and political category); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506, 549-50 (1994) (arguing that protection of individuals from discrimination based on their sexual orientation should not be based on immutability arguments, because persons can suppress expression of their sexual orientation); Linda Nicholson, *Interpreting Gender*, 20 SIGNS 79, 79-83 (1994) (reasoning that sex cannot be understood as a biological given, since the body is itself a variable, which is always seen through social interpretation, and thus cannot ground cross-cultural claims).

4. See Harris, *supra* note 1, at 592.

5. See, e.g., Mary Maynard, ‘Race’, *Gender and the Concept of ‘Difference’ in Feminist Thought*, in THE DYNAMICS OF ‘RACE’ AND GENDER: SOME FEMINIST INTERVENTIONS 9, 14 (Haleh Afshar & Mary Maynard eds., 1994) (noting that black women are more likely than white women to experience the family as not simply a site of women’s subordination but also one of resistance and solidarity against racism); Harris, *supra* note 1, at 598-99 (explaining that, for black women, rape is a more complex experience deeply rooted in color as opposed to gender alone). Black women understand rape differently from white women, given that “the paradigm experience of rape for Black women has historically involved the white employer in the kitchen or bedroom as much as the strange Black man in the bushes”; that rape against black women during slavery was not even recognized as a crime; that, even after the Civil War, rape laws were not used to protect

examples have not yet added up to a systematic analysis of the differences between race and sex discrimination, and how these differences should matter in the law.

This Lecture focuses on a topic in family law—child custody—as a starting point for a more detailed assessment of the similarities and differences between sex and race discrimination. It was Professor John DeWitt Gregory who first challenged me to think more deeply about this issue. One of the provisions I drafted as a Reporter for the American Law Institute (“ALI”) Principles of Family Dissolution Project,<sup>7</sup> on which Professor Gregory was an Adviser, is a “non-discrimination” provision that prohibits courts from considering in custody cases any of the usual factors: race, ethnicity, sex, religion, or sexual orientation. Professor Gregory, early on in the project, questioned me about lumping all of these non-discrimination factors together. “They are different, aren’t they?” he insisted. “Shouldn’t there be a separate provision for each, reflecting the differences?” I resisted at first, but his questions eventually led me to try to think more comparatively about these separate factors.

This Lecture focuses on the operation of, and attempts to eliminate, race and sex discrimination in child custody law. The methodology I use is to move back and forth between examples of race discrimination and sex discrimination, showing how looking at one in relation to the other contributes to a better understanding of both.<sup>8</sup> In doing so, I try to resist

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black women because they were considered promiscuous by nature; and that “for black people, male and female, ‘rape’ signified the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by ‘crying rape’), by white women.” *Id.*

Several commentators have argued that discrimination against black women in employment often goes unrecognized insofar as the discrimination does not appear to affect all blacks, or all women. *See, e.g.,* Crenshaw, *supra* note 1, at 144.

6. *See, e.g.,* Crenshaw, *supra* note 1, at 143 (noting that, in the context of employment discrimination, “Black women are protected only to the extent that their experiences coincide with those of [white women or black men]”).

7. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, §2.14 (Tentative Draft No. 3, Part I, 1998).

8. Some have warned that comparing race and sex discrimination reinforces racism due to the fact that when concerns for race are combined with other concerns, the significance of race tends to get marginalized. *See, e.g.,* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 399 (noting that when sexism and racism are compared, “the significance of race [is] marginalized and obscured, and the different role that race plays in the lives of people of color and of whites [is] overlooked”). On the one hand, this Lecture may prove the point, in that it allocates more space and time to gender than to race. On the other hand, if there are insights to be gained from examining one form of discrimination in light of the other, a fire wall between the two will block these insights. In this Lecture I acknowledge that gender issues tend to overshadow issues of race in custody matters, and I offer a preliminary explanation. If comparing

the temptation to offer grand generalizations and broad historical comparisons. I do not compare and contrast, for example, the legacy of slavery of African Americans and the legal subordination of women, although many similarities and differences exist. I do not compare and contrast the benign rationalizations offered in support of the subordination of blacks and women throughout history, nor how the relationships of wives, mothers, daughters, and sisters to the men in their lives have lessened, or worsened, as compared to the relationships of various racial minorities to white people. These broader points of contrast and comparison may come later when I apply this comparative approach to race and sex discrimination to other contexts, including employment, education, the political process, and, perhaps, entertainment and sports. At this point, however, my work is guided by the insights yielded from a close, piece-by-piece examination of a specific area. I want to build from the bottom up the similarities and differences and get these right, before committing to more universal propositions.

#### I. DISCRIMINATION AND ROLE POLICING

I first consider *Palmore v. Sidoti*,<sup>9</sup> a custody case involving a white couple, Linda and Anthony, and their three-year-old daughter, Melanie.<sup>10</sup> Linda was awarded custody of Melanie after the couple's divorce.<sup>11</sup> A year later, when Linda began "cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later," the biological father, Anthony, sought custody himself.<sup>12</sup> The trial court granted the father's modification motion, reasoning that:

despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains [sic] school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.<sup>13</sup>

The Supreme Court took a hard line in this case, holding that it is impermissible for a court to give effect to private, racial prejudice in

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race to sex leads to more racism, the connection should be further explored and problems remedied, rather than blocking off the area of inquiry.

9. 466 U.S. 429 (1984).

10. *See id.* at 430.

11. *See id.*

12. *See id.*

13. *Id.* at 431 (emphasis omitted) (quoting the findings of the trial court below).

custody cases, at any time and under any circumstances.<sup>14</sup> The Court insisted that “[w]hatever problems racially mixed households may pose for children in 1984,” the state cannot give them effect.<sup>15</sup> In taking this position, the Court did not deny that children may suffer as a result of ignoring race.<sup>16</sup> Rather, it concluded almost categorically that the harm of considering race in a custody case is greater than the possible gains.<sup>17</sup> Race must be ignored to serve a greater good than the possible welfare of an individual child.<sup>18</sup>

No case so clearly prohibits consideration of sex in custody cases. It should be noted, however, that there was a potential gender issue in *Palmore* that received no attention from the Supreme Court. It appears that Linda began cohabiting with Clarence before they were married.<sup>19</sup> According to the trial court, the mother’s “‘see[ing] fit to bring a man into her home and carry[ing] on a sexual relationship with him without being married to him’” showed that she “‘tended to place gratification of her own desires ahead of her concern for the child’s future welfare.’”<sup>20</sup> Nothing more seems to have been made of this factor, either by the trial court or on review, but some courts have since noticed that mothers who cohabit outside of marriage tend to be penalized in ways fathers who cohabit outside of marriage are not, and have concluded that differential treatment constitutes sex discrimination.<sup>21</sup>

Practitioners, scholars, and, increasingly, appellate courts have identified and sought to eradicate a double standard based on sex in custody disputes.<sup>22</sup> Criticized, for example, are cases that appear to at-

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14. *See id.* at 433.

15. *Id.* at 434 (emphasis added).

16. *See id.* at 433.

17. *See id.*

18. *See id.* at 434.

19. *See id.* at 430.

20. *Id.* at 431 (quoting the findings of the trial court below).

21. *See, e.g.,* *Linda R. v. Richard E.*, 561 N.Y.S.2d 29, 30-31 (App. Div. 1990) (reversing custody award to the father by the trial court, which had allowed extensive testimony regarding the mother’s alleged affair and had allowed no similar line of questioning regarding the father); *cf. Merriam v. Merriam*, 799 P.2d 1172, 1176-77 (Utah Ct. App. 1990) (determining that the trial court did not abuse its discretion in weighing the mother’s infidelity against her). *See generally* Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 303-11 (1992) (describing cases in which mothers and fathers who have had extramarital affairs are evaluated differently in custody disputes).

22. *See, e.g.,* D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark’s Double Bind*, 6 HASTINGS WOMEN’S L.J. 295, 322 (1995) (arguing that “professional mothers are . . . treated differently than similarly situated men” such that working women are expected to be perfect mothers or choose between their work-life and family-life while

tach a different significance to employment by mothers outside the home than they attach to employment by fathers.<sup>23</sup> In these cases, courts seem to expect fathers to work outside the home, and respect them for their employment success.<sup>24</sup> In contrast, mothers, although they also usually work outside the home, are expected to make compromises in their careers for their children, and are penalized when they do not.<sup>25</sup> One South Carolina appellate court, for example, affirmed an award of custody to the father, who was an oilman, based in part on an analysis of how much time the mother, who was an obstetrician, would have to be away from home and what caretaking arrangements she would have for the child; no such analysis of the father's work schedule or baby-sitting arrangements is mentioned in the opinion.<sup>26</sup> An Ohio appellate court upheld a custody award to the father, even though the mother had been the primary caretaker for all four of the couple's children for seventeen years, because, during the last year before the divorce, she worked part-time, attended school, and was away from the home for large amounts of time, which the trial court characterized as "'selfish.'"<sup>27</sup> A Delaware court blamed the mother who worked, rather than the father who also worked, for not having made a strong enough effort to persevere through the couple's marital problems and for not having given up her career aspirations until her children were raised, if necessary.<sup>28</sup>

Similarly, caretaking by mothers sometimes is taken for granted by courts in custody cases, whereas when fathers "help out," their contributions tend to be highly exaggerated.<sup>29</sup> An at-home father in an Iowa case, for example, was credited with having "relieved" the mother of numerous child raising problems that occurred during her working hours, even though she worked from 5:30 a.m. to 2:00 p.m., and performed all the responsibilities for the family during her nonworking

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"[f]athers are confronted neither with the expectation of parental perfectibility nor the demand that they make a choice").

23. See, e.g., Weisberg, *supra* note 22, at 298-309 (discussing cases in which women have been denied custody because of their demanding careers); see also *infra* notes 26-28 and accompanying text (outlining three court cases that reflect the disparate treatment of working mothers in custody battles).

24. See *infra* notes 26-28 and accompanying text.

25. See Weisberg, *supra* note 22, at 322.

26. See *Richmond v. Tecklenberg*, 396 S.E.2d 111, 114 (S.C. Ct. App. 1990).

27. See *Olive v. Olive*, No. 91CA005200, 1992 WL 139997, at \*1 (Ohio Ct. App. June 17, 1992) (quoting the findings of the trial court below).

28. See *James E.S. v. Sondra K.S.*, No. CN89-6810, 1990 WL 91603, at \*4 (Del. Fam. Ct. June 14, 1990).

29. See, e.g., cases cited *infra* note 30-32 and accompanying text.

hours.<sup>30</sup> Similar issues were raised in the highly publicized *Young v. Hector*<sup>31</sup> case in Florida. *Young* involved a lawyer, Alice Hector, and her unemployed husband, who at one point in the litigation was awarded custody of his children based on his involvement in their school and after-school activities, even though a housekeeper provided most of the caretaking during the day when he was home and the mother provided their primary care in the mornings, evenings, and on weekends.<sup>32</sup>

Before I go further, let me acknowledge what you may have already noticed, which is that this Lecture is already somewhat off kilter, with discussion of sex overwhelming that about race. This imbalance is present also in the cases, as there are far more appellate custody cases that raise issues of sex than there are those that raise issues of race. One explanation might be that expectations about parents are determined more by their sex than by their race; another is that sex is more conceptually central to one's identity than race.<sup>33</sup> But it may be as simple as that parents fighting for custody are far more likely to be of different sexes than they are of different races, making it possible to observe a double standard within a single case—at least when both parents have had affairs, or worked the same number of hours outside the home and performed identical parenting roles.

Although there are more sex discrimination cases than race discrimination ones, both are enabled by the open-ended best-interests test applied in custody cases, which invites bias of all types. The best-interests test is an empty vessel, to be filled by the subjective views of judges about what is good for children, including views about sex and

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30. See *In re Marriage of Fennell*, 485 N.W.2d 863, 864 (Iowa Ct. App. 1992); see also *Landsberger v. Landsberger*, 364 N.W.2d 918, 919-20 (N.D. 1985) (affirming custody award to the father based on the fact that, although the mother was the primary caretaker and knew more about the children, the father had baby-sat the children, learned about their care, and was now more focused on them, while the mother had since begun seeking a social life outside the home in the evenings and was a "strongwilled" "career mother" who believed "that a life limited to homemaking is not adequate to fulfill her needs") (quoting the findings of the trial court below); *Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6, 16 (W. Va. 1993) (Workman, C.J., dissenting) (commenting that the father, an architect, was considered an equal caretaker with the stay-at-home mother on the basis that he "helped in the evenings and [on] weekends").

31. 740 So. 2d 1153 (Fla. Dist. Ct. App. 1998).

32. See *id.* at 1158-61 (upholding, upon rehearing en banc, trial court award to mother and reversing appellate panel which had held that there was insufficient evidence to support the trial court's award).

33. See Anthony Appiah, "But Would That Still Be Me?": Notes on Gender, "Race," Ethnicity, As Sources of "Identity," in *RACE/SEX: THEIR SAMENESS, DIFFERENCE, AND INTERPLAY* 75, 78-79 (Naomi Zack ed., 1997).

race.<sup>34</sup> It is possible, however, that one of the reasons race discrimination cases are less frequent than sex discrimination is that such cases are more difficult to recognize.

There are a handful of reported modification cases that involve white mothers losing custody after having affairs with black men.<sup>35</sup> Every one of these cases affirms the change of custody on grounds that there were other legal justifications for the modification besides race, such as the fact that the mother lied about the affair, or that her sexual activity displayed bad moral judgment.<sup>36</sup> It is difficult to second-guess these cases under a best-interests test because it is not a test that compels transparency. Race and sex may simply intersect one another, each factor thereby obscuring the significance of the other. It is suspicious, however, that race discrimination is virtually never recognized in custody cases, except when it is stipulated.<sup>37</sup>

A close look at the fundamentals of sex discrimination cases might help us better to identify cases of race discrimination. What we can observe in the sex cases is that discrimination serves to reinforce conventional roles—to keep mother in her place as sexually faithful, totally dedicated to her children and family, and to keep father in his place as primary provider. With this model in mind, another look at *Palmore* reveals some troubling, but revealing, possibilities. In *Palmore*, the trial court (and the father) articulated the problem of Melanie's suffering as a result of the racial animus of others.<sup>38</sup> Rethinking the case in terms of the possibility of role policing, one may wonder if the trial court's concern was, instead, that there is something improper about a family consisting of different races. In other words, for the trial court, the threat to Melanie may not have been a problem of *peers* no one could control,

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34. See Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 467-68 (1999).

35. See, e.g., *Jennings v. Jennings*, 490 So. 2d 10, 12-13 (Ala. Civ. App. 1986) (concluding that award of custody of children to father, after mother entered into an affair with a black doctor, was based on mother's sexual activity, not the race of her paramour); *Jones v. Jones*, 937 S.W.2d 352, 356 (Mo. Ct. App. 1996) (finding that mother's allegation that trial court modified custody to father based on mother's association with black men was not supported by the record); *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999) (disapproving trial court's references to race in its decision, but nonetheless upholding trial court award of child to father after mother had affair with African American doctor, on grounds that the decision was based on factors like the mother's lying and her extra-marital affair, rather than race).

36. See cases cited *supra* note 35.

37. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citing findings of the trial court below).

38. See *id.* at 431 (citing findings of the trial court below).



but rather *parents*—a white mother and black stepfather who crossed the line—straying too far from their appropriate racial tracks.

In this regard, I note that the Supreme Court in *Palmore* refers approvingly to its 1917 decision<sup>39</sup> in *Buchanan v. Warley*,<sup>40</sup> overturning a Kentucky law that forbade whites and “Negroes” from buying houses in each other’s neighborhoods.<sup>41</sup> What is interesting about *Buchanan* is that it disapproved of a series of offered purposes for the Kentucky statute,<sup>42</sup> including the purpose of “‘prevent[ing] conflict and ill-feeling between the white and colored races[,] . . . preserv[ing] the public peace,’”<sup>43</sup> and protecting property values from depreciating on account of a breakdown in the racial integrity of a neighborhood.<sup>44</sup> The Court found each of these purposes constitutionally insufficient to justify the statute.<sup>45</sup> However, a fourth rationale—that of preserving racial purity—was handled differently.<sup>46</sup> Rather than dismissing the motive as illegitimate, the Court went to some trouble to redefine the issue of the case<sup>47</sup> so as to avoid having to commit itself one way or the other on this motive. The case, the Court explained, “*does not deal* with an attempt to prohibit the *amalgamation* of the races,” but rather with the “civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.”<sup>48</sup> This resistance to confronting the impulse to protect racial purity suggests that there may have been some sympathy with the fear of racial amalgamation. Could this sympathy remain in some form? This is not the kind of thing one can easily prove, but consider whether the trial court in *Palmore* would have been equally concerned about Melanie if Mrs. Sidoti was African American, and her second marriage was to a white man. If the justification was really the stigma of living in a mixed-race household, one would expect the same concern. But if racial purity was the objective—given the historical context in which the white race is the only race with a perceived purity to protect—one

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39. *See id.* at 433-34.

40. 245 U.S. 60 (1917).

41. *See id.* at 70-71, 82.

42. *See id.* at 81.

43. *Id.* at 70 (quoting ordinance of the City of Louisville, approved May 11, 1914).

44. *See id.* at 82.

45. *See id.* (observing that “property may [also] be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results”).

46. *See id.* at 73-74, 81 (mentioning the preservation of racial purity as a motivation twice).

47. *See id.* at 75.

48. *Id.* at 81 (emphasis added).

would not expect the addition of a white parent to a black parent's home to raise the same fears about a child's welfare.

## II. DISCRIMINATION AND DISPARATE EFFECTS

Another set of discrimination claims concerns the complaint of fathers that the sex-based double standard works *against* them, not in their favor. The evidence offered is circumstantial, but rather impressive: women obtain custody in eighty to ninety percent of cases.<sup>49</sup> What is one to make of this disparity? In other contexts in which women, or minorities, receive an end of the stick that is this short, suspicions would be high indeed.

One needs to look more carefully at exactly what is being claimed here. The claim assumes that sex equality demands equal results for men and women but, if this is the case, how should such equal results be measured? One possibility is that mothers and fathers be awarded custody an equal percentage of the time. Another is that both parents be awarded equal time with the child at divorce in each case, i.e., joint physical custody. One might protest that such approaches ignore the child's best interests, but if the child's interests do not justify race-based custody decision-making, arguably neither are they sufficient to trump society's interest in avoiding sex discrimination.

An alternative response is that race and sex discrimination *are* different, and that avoiding race discrimination is worth a higher price than avoiding sex discrimination. This proposition, however, requires a distasteful and virtually imponderable balancing of injustices. The better analysis questions the claimed analogy between the father's claim and the sex and race claims examined thus far. What occurred in *Palmore* was, by stipulation, race discrimination;<sup>50</sup> the question posed by the case was whether it was justified. The statistical disparity for mother cus-

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49. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 99-103 (1992). Actually, fathers do not do all that badly, vis-a-vis mothers, when they contest custody. See generally *id.* at 99-106. Here, estimates vary widely, but it appears that in formally contested cases, women get custody only about half the time, or less. See *id.* at 104 (reporting results of California study showing that in contested cases in which each parent wanted sole custody, fathers won 11.3% of the time, as compared to 45.3% for mothers, 35.9% for joint custody, and 7.5% for split custody); Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 256-57 (1994) (reporting Utah study of 1087 cases decided between 1970 and 1993, showing that where custody was formally disputed, custody was awarded to the mother 50% of the time, to the father 21% of the time, and to both parents jointly or in a split custody arrangement 30% of the time).

50. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

tody, in contrast, proves only disparate results, not that discrimination has actually occurred; and one cannot get to the question of whether sex discrimination is justified until it is determined whether or not sex discrimination has occurred.

Here, I would distinguish between two possibilities. On the one hand, some of the disparity in favor of mothers may be because courts evaluate claims by fathers with a bias against them, based on the belief, conscious or otherwise, that mothers are better parents. While this type of discrimination—like the examples given earlier of a double standard against women in custody cases—is not easy to identify, it is sex discrimination when it occurs and should be prohibited.

On the other hand, disparate results against men could be the result of the neutral application of custody standards meant to protect the best interests of the child. Child custody standards tend to stress past caretaking and emotional bonds which are generally generated through caretaking relationships, because it is thought that these are the best measures of the best interests of the child.<sup>51</sup> To state an obvious social fact, mothers are, on average, more actively engaged than fathers, on average, in the caretaking of their children before divorce.<sup>52</sup> Studies show that, on average, mothers are available for their children twice as much as fathers, spend three times as much time in face-to-face interactions (as opposed to passive baby-sitting), and outperform fathers nine to one when it comes to taking the responsibility of arranging child care, making medical appointments, deciding on the child's clothing, staying home when the child is ill, and other such matters.<sup>53</sup> Note that, while the average woman invests more in her children, the average man invests more in his education and career, works longer hours, and builds up more extensive work experience.<sup>54</sup> Given these social realities, one should be no more surprised by the fact that women most often get custody at divorce than by the fact that men, on average, earn more than women.

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51. See, e.g., WASH. REV. CODE ANN. § 26.09.187(3)(a)(i) (West Supp. 1996) (noting that, in determining residential provisions for a child, the court must consider "[t]he relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child").

52. See Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 127 (1997).

53. See Michael E. Lamb et al., *A Biosocial Perspective on Paternal Behavior and Involvement*, in PARENTING ACROSS THE LIFE SPAN: BIOSOCIAL DIMENSIONS 111, 126-29 (Jane B. Lancaster et al. eds., 1987).

54. See Bartlett, *supra* note 34, at 473-74.

Yet again one might protest: women's rights advocates *complain* about earning less than men. Are not fathers' rights complaints in this context of the same order, deserving of the same recognition? To be sure, neither men nor women should have it both ways in this debate. But it is important to define what constitutes nondiscriminatory treatment in each context. When the father's qualifications are judged differently than the qualifications of the mother, under the same standard, this is sex discrimination, just as it is sex discrimination when women are evaluated by different criteria than men in the workplace. Also, when the criteria for determining a child's best interests have been stacked—for example, when undue weight is given to certain factors *because* those factors are associated with women, and thus tend to favor them—this is sex discrimination, just as it is sex discrimination to adopt job criteria because the jobs are designed with men in mind. When neither of these things is going on, however, and when the criteria used are designed appropriately to serve the legitimate purpose of protecting the child's best interests, the problem, if there is one, is not one of sex discrimination—at least not sex discrimination in custody decision-making.

Few seriously would propose that employers have an obligation to pay women more simply because otherwise they will not, on average, make as much as men. The same applies to men and child custody. Men should not be awarded custody more often just to equalize results for fathers and mothers. Society may wish to alter cultural expectations that make caretaking an activity governed by gender, just as society may choose to alter the expectations that lead men to disproportionately invest their labor in market employment. If either of these social revolutions succeed and men assume more caretaking responsibility for children, women are likely to earn more money, and men are likely to fare better in custody cases. Before they succeed, however, men (and women) will have to put up with a disparate impact in custody cases.

This works both ways. In a 1986 California case, *Burchard v. Garray*,<sup>55</sup> the state supreme court ruled out consideration of remarriage and economic stability as factors in custody cases.<sup>56</sup> A concurring opinion in the case by Chief Justice Rose Bird asserted that consideration of these factors is illegitimate because such consideration systematically disfavors women and favors men.<sup>57</sup> If one rejects the disparate impact claim by fathers discussed above, one needs to reject this analysis as well, and

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55. 724 P.2d 486 (Cal. 1986).

56. *See id.* at 491-92.

57. *See id.* at 493-96 (Bird, C.J., concurring).

I do. This does not mean, necessarily, that the factors of remarriage and economic stability should be relevant in custody cases. In my view they are not, but for a different reason, which I will explain shortly.

This prolonged discussion of fathers' rights claims reveals a significant difference between race and sex discrimination in custody cases. Societal differences between mothers and fathers with respect to the practices and expectations of childrearing should lead one to *expect* that custody cases would be skewed in favor of mothers. Also, it gives further support to the proposition that parenting is governed more by gender than by race. I say this tentatively, and only because I know of no differences between whites and blacks or other racial groups that would be thought reasonably to bear on custody decisions and that are comparable to those that exist with respect to differences between mothers and fathers. If I am right, the fact that custody is skewed as to sex is only to be expected, under current social circumstances, while skewed results as to race is not.

### III. DISCRIMINATION AND BENIGN MOTIVES

Next consider the case of a mixed race couple, Sarah, who is white, and Bob, who is black. Their biological, biracial son, Ralph, perceives himself, and is perceived by others, as black. At the divorce of Sarah and Bob, Bob uses this fact to argue that Ralph should live with him.

This case might seem like a harder case than *Palmore*.<sup>58</sup> If it does, this is probably because the benign purpose of furthering the child's positive racial identity seems more persuasive, and more genuine—in other words, less of a pretext—than the racial stigma argument offered in *Palmore*.<sup>59</sup> Ralph will live in a world in which he will almost certainly face discrimination as a result of being perceived as black, and because Bob shares this experience, it may be thought that he has more to teach Ralph on the subject than Sarah does. This might be viewed as a claim for affirmative action that could be justified in the same way one might justify hiring preferences for Hispanic police to patrol Hispanic neighborhoods, or hiring preferences for African American teachers in African American neighborhood schools: taking account of race-related factors that are relevant to jobs that need doing, so that the jobs will be better done.

Consider, however, the same claims made in the context of gender role modeling. Sam is twelve. His parents, Dave and Marge, each want

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58. See generally *Palmore v. Sidoti*, 466 U.S. 429 (1984).

59. See *id.* at 431 (citing findings by the trial court).

primary custody at divorce. Dave argues that he should have primary custody of Sam, even though Marge has been Sam's primary caretaker throughout the marriage, because Sam is entering adolescence and figuring out what it means to be a man. Marge could make the same arguments in her own favor, if their child were twelve-year-old Doris.

There is at least one interesting difference between these two examples. While the case for matching as to both race and sex could be viewed as helping children deal with adverse social circumstances, the argument for race modeling only runs one way. One would not expect white parents to make this argument based on the need of their white children for a healthy race identity, and if they did, you would not expect them to succeed. Gender role modeling arguments, however, run both ways: in favor of fathers seeking custody of their boys and mothers seeking custody of their girls. These arguments are based on a notion that there are two distinct sexes—indeed, biologically distinct—each with different skills to be learned, manners (and mannerisms) to be absorbed, habits to be ingrained, desires to be reinforced, and attitudes to be taught.

Despite this difference, the role modeling arguments with respect to both race and sex are equally and profoundly unpersuasive, for reasons that are again most apparent when one moves back and forth between sex and race. The most obvious problem is the reinforcement of damaging stereotypes. The fact that stereotypes damage both boys and girls does not make the damage less serious. It might be tempting to claim that the gender role modeling argument is based on biology and thus not a social construct. It is also possible, however, that the biological difference makes the reinforcement of damaging gender stereotypes more, not less, of a problem, since biological difference gives an aura of scientific legitimacy to gender roles—just as the science of race differences was used at one time to legitimize the subordination of racial minorities. In fact, both race and gender role modeling represent adaptations to social realities that *intentionally*, not just incidentally, are designed to fit into and recreate the realities to which they adapt.

The role modeling argument with respect to race draws on a *non*-biological justification; in fact, nowhere is the non-biological character of race more apparent than when one classifies a child whose parents are black and white, as black. This classification thereby more noticeably participates in the process of racial subordination and, thus, is troubling on that account. Does it help that, like other affirmative actions which many do not oppose, society participates in this process only in order to take account of and address a child's problems in living in a ra-

cially discriminatory society? *Palmore* would seem to say no—that taking account of racial prejudice is not a sufficient basis for race discrimination.

Whatever the reach of *Palmore*, there are other defects in role modeling arguments that are fatal and apply equally to race and sex. First, these arguments assume that there is some ideal identity of gender or race: the “something” that one parent, on account of his or her sex or race, is presumed to do better. But, how would is this something ever to be defined? For girls, is it to put being a wife and mother above all else? To attract boys? To compete hard at sports? To excel at school? To camp, fish, and use a gun? How should an appropriate race identity be defined? What behaviors, or attitudes, does this entail?

Even if it was possible to say from which model of “identity” a child would benefit—requiring judgments that are obviously perilous, at best—it cannot be reliably assumed that a parent of the same sex and race as the child will be better able to model *that* identity than that the other parent. A mother does not necessarily model better attitudes and behaviors for her daughter than the girl’s father, nor can it be assumed categorically that a white woman who has married a black man has, as between the two, less understanding of the needs of her biracial child.

Finally, both race-matching and sex-matching arguments assume that a child whose parents do not live together will be parented by only one residential parent. Ordinarily, however, it is expected that a child will have some continuing contact with both parents, even if more time is spent with one parent than the other. Both parents remain role models. The intact, nuclear family does not require a child to choose between role models. Family dissolution should not require this either.

#### IV. THE NON-DISCRIMINATION PRINCIPLE

Hopefully, I have persuaded you that looking at issues of race and sex discrimination in custody decision-making side-by-side reveals complexities that help one to understand each better. While the way one runs the analogies, as well as the particular insights that any one person might gain from a comparative study, will vary based on one’s different experiences and expertise, it is possible to learn something about race discrimination by looking at sex discrimination, and vice versa. For this reason, I consider that the chase Professor Gregory led me on was well worthwhile.

In terms of legal standards, however, the analysis presented in this Lecture does not lead to the more nuanced, alternative principles for each type of discrimination that might have been expected. To the con-

trary this analysis strengthens the case for applying the same non-discrimination standards for race and sex in custody cases. In the remainder of this Lecture, I outline in very broad terms what these standards should be. These are the Principles that I have been developing, with the help of Professor Gregory and others, for the ALI.

First, discrimination should be categorically prohibited. The ALI principles prohibit consideration of the race, ethnicity, or sex of the parent or the child, in exactly the same terms.<sup>60</sup> This precludes consideration of the race of the person a parent marries. It means applying the same criteria to mothers and fathers, not a double standard. It means no race-matching or sex-matching. It does not mean that a child's need for a healthy self-image, whether it relates to sex or race, cannot be considered.<sup>61</sup> A parent's ability to meet a child's needs for a positive self-image should be relevant to the same extent as other parental abilities. However, nothing should be *presumed* about a parent's ability based on his or her race or sex. This is, for the most part, the current state of the law with respect to race,<sup>62</sup> and it prohibits the preference some jurisdic-

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60. See *supra* note 7.

61. See, e.g., *Lee v. Halayko*, 590 N.Y.S.2d 647, 648 (App. Div. 1992) (affirming custody award of biracial children to mother after trial court considered her plans to build a Chinese cultural center in her community and to have the children learn the Chinese language); *Henggeler v. Hanson*, 510 S.E.2d 722, 725 (S.C. Ct. App. 1998) (upholding trial court award of custody of adopted children to mother because she was "mindful of the delicate issue of the children's Korean heritage and their need for diversity in their environment" while the father was not) (quoting final order of the Family Court for Charleston County, awarding custody to mother); *Jones v. Jones*, 542 N.W.2d 119, 123-24 (S.D. 1996) (finding that it was proper for the trial court to consider which parent was more prepared to expose the children to their ethnic heritage); cf. *Tubwon v. Weisberg*, 394 N.W.2d 601, 604 (Minn. Ct. App. 1986) (affirming custody of child of black, American Indian, and Irish heritage to Jewish stepfather over unfit mother, after trial court found that "[b]oth parties seek to expose the children [to] and educate them with respect to these different cultures") (alteration in original) (quoting findings of fact by the trial court below); *Harris v. Harris*, No. E-87-11, 1987 Ohio App. LEXIS 9996, at \*1, 7 (Dec. 11, 1987) (concluding that award of biracial children to black father was supported by the evidence, after trial court gave "little weight" to the fact that the children were biracial) (quoting finding of trial court below).

62. See, e.g., D.C. CODE ANN. § 16-914 (1997) (stating that race, color, or national origin "shall not be a conclusive consideration" in custody and visitation matters); WIS. STAT. ANN. § 767.24(5) (West 1993) ("The court may not prefer one potential custodian over the other on the basis of the . . . race of the custodian."); *In re Marriage of Brown*, 480 N.E.2d 246, 248 (Ind. Ct. App. 1985) (noting that *Palmore* prohibits consideration of whether biracial children would be better served by rearing them in a black home rather than a white one).

Cases addressing the issue of race in disputes between nonparents and parents, or in the adoption context, are more mixed. See, e.g., *In re the Petition of D.I.S. for the Adoption of S.A.O.*, 494 A.2d 1316, 1323-24 (D.C. 1985) (affirming trial court order of adoption to grandmother, based in part on the "trauma [the child] would face in adolescence in searching for her roots if placed with [white foster mother], and [the grandmother's] greater ability to foster the child's sense of her Guyanese/Latino heritage"); *In re the Guardianship of Astonn H.*, 635 N.Y.S.2d 418, 422 (Fam. Ct. 1995) (asserting that race is one factor among many to be considered in a dispute



tions still allow for a parent of the same sex as the child<sup>63</sup> especially during or right before adolescence.<sup>64</sup>

between lesbian partner of deceased mother and paternal grandparent); *In re Davis*, 465 A.2d 614, 626, 632 (Pa. 1983) (holding that the court would uphold award of custody of biracial child to black foster parents instead of older white couple with whom child had lived, based on a number of considerations, including race). Even in the adoption context, however, the authority of earlier cases approving consideration of race in adoption cases has been substantially shaken by federal legislation prohibiting the denial to any individual of the opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the individual or child involved. *See* 42 U.S.C. § 671(a)(18) (Supp. III 1998). No state now mandates consideration of race in adoption or foster placements, with Illinois being the last state to eliminate such a mandate. *See* 750 ILL. COMP. STAT. ANN. 50/15.1(b)(8) (West Supp. 1999) (repealing 750 ILL. COMP. STAT. ANN. 50/15.1 (West 1998) (allowing consideration of "race, ethnic heritage, behavior")); *see also* WASH. REV. CODE ANN. § 26.33.190(2)(e) (West 1997) (requiring discussion with prospective adoptive parents of "[t]he relevance of the child's racial, ethnic, and cultural heritage"). Other states have been reducing the role race plays in adoption placements. *Compare, e.g.,* CAL. FAM. CODE § 222.35 (West 1994) (making placement with an adoptive family with the same racial background or ethnic identification a priority), *with, e.g.,* CAL. FAM. CODE § 8708(a) (West Supp. 2000) (prohibiting categorical denial of the opportunity to adopt based solely on race, color, or national origin). Case law is also moving increasingly away from allowing consideration of race in adoption and foster care placements. *See, e.g.,* *McLaughlin v. Pernsley*, 876 F.2d 308, 309-10, 318 (3d Cir. 1989) (upholding preliminary injunction against city's removal of black child from white foster parents solely on the basis of race); *Reisman v. Tenn. Dep't of Human Servs.*, 843 F. Supp. 356, 364 (W.D. Tenn. 1993) (holding that automatically assigning a black heritage to biracial children and prioritizing adoption placements in homes with black parents violates the Equal Protection Clause).

63. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-403(E) (West Supp. 1998) (providing that a court "shall not prefer a parent as custodian because of that parent's sex"); ME. REV. STAT. ANN. tit. 19-A, § 1653(4) (West 1998) (stating that "[t]he court may not apply a preference for one parent over the other . . . because of the parent's gender or the child's age or gender"). In other jurisdictions, the prohibition of a preference for the same-sex parent has been established by case law. *See, e.g.,* *Giffin v. Crane*, 716 A.2d 1029, 1037 (Md. 1998) (applying Maryland Equal Rights Amendment, which provides that gender is not a "permissible factor in determining the legal rights of women, or men"); *Seeley v. Jaramillo*, 727 P.2d 91, 94-95 (N.M. Ct. App. 1986) (reversing modification of custody of three-year-old child from father to mother, which had been based on expert testimony that child should be with the mother in order to have an appropriate role model); *Synakowski v. Synakowski*, 594 N.Y.S.2d 852, 853-54 (App. Div. 1993) (affirming award of custody of daughters to father by trial court, which disregarded expert testimony that, all else being equal, young children should be placed with the same-sex parent); *Brooks v. Brooks*, 466 A.2d 152, 158 (Pa. Super. Ct. 1983) (rejecting mother's claim on appeal that female children should be placed with the mother); *Hubbell v. Hubbell*, 702 A.2d 129, 132 (Vt. 1997) (holding that the trial court erred in applying preference for same-sex parent, in awarding custody of child to father instead of child's primary caregiver mother).

64. Alabama does so by statute. *See, e.g.,* ALA. CODE § 30-3-1 (1998) (providing that "the court may give the custody . . . having regard to . . . the age and sex of the children"). Other jurisdictions leave vague whether their general prohibition against sex-based presumptions would apply to a preference in favor of the same-sex parent. *See, e.g.,* GA. CODE ANN. § 19-9-3(a)(1) (1999) (providing that "there shall be no prima-facie right to the custody of [any minor] child . . . in the father or mother"); VA. CODE ANN. § 20-124.2(B) (Michie 1995) (stating that "there shall be no presumption or inference of law in favor of either [parent]" in awarding custody of children). For cases approving custody which assume that children derive greater benefit from

Second, custody standards to determine what is in a child's best interests should be more determinate. The ALI standards offer determinacy by presuming that custody will be allocated to parents in proportion to the share of caretaking each parent undertook before the divorce. Past caretaking patterns are a good guide to which parent is best able to care for the child and which parent has the closest emotional tie to the child. They also provide a more objective basis for decision-making, thereby cutting down on litigation and strategic behavior. Most importantly for present purposes, when the standards are more determinate, there is less opportunity for courts to allow unconscious race and gender stereotypes to intrude. If the more determinate standards contained in the proposals were the law, none of the instances of race or sex discrimination referred to in this Lecture should occur.

Whatever non-discrimination provisions exist, it is important to realize that ending race and sex discrimination is not simply a question of getting the legal standards right. The law can prohibit race and sex discrimination in a firm and decisive manner, but not be able to recognize either when they occur. Indeed, it is the recognition of discrimination, rather than the commitment to end it, that poses the most significant impediment to its elimination in today's society. This Lecture has tried to show that race and sex present patterns and habits of thinking that are similar in some ways and different in others—looking at them together may help to break up those patterns and enable society to better recognize the ways in which race and sex should not matter, but do.

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living with the parent of the same sex, see *In re Marriage of Arcaute*, 632 N.E.2d 1082, 1085 (Ill. App. Ct. 1994) (approving trial court's reasoning that "other things being equal, pre-adolescent children and adolescent young people derive substantial benefits from the close personal relationship with the same sex parents to whom they look for a model") (quoting from the lower court's written order); *Warner v. Warner*, 534 N.E.2d 752, 754-55 (Ind. Ct. App. 1989) (affirming trial court's custody award that was partly based on the testimony of a psychologist that "as a child gets older, being able to identify with a parent of the same sex is important"); *Krotoski v. Krotoski*, 454 So. 2d 374, 376 (La. Ct. App. 1984) (noting testimony of two experts that "it would be more beneficial to the child to be with a same-sex parent during the difficult puberty transitional years" in its affirmation of the trial court's custody award of daughter to mother) (quoting testimony of two experts who testified at trial); *Dalin v. Dalin*, 512 N.W.2d 685, 689 (N.D. 1994) (upholding custody award of daughter to mother, appellate court concluded that trial court's questions about who would help teach the child "certain things that a girl should learn that [are] easiest to learn from a woman" were "not motivated by or evidence of gender bias") (alteration in original) (quoting trial court's questioning of father's mother); *Weber v. Weber*, 512 N.W.2d 723, 725-27 (N.D. 1994) (determining that the trial court award of custody of son to father was not clearly erroneous, even though based in part on testimony by expert, who had not met with the mother, that boys are better off with their fathers).